

WATER ALLOCATION PROGRAM DEVELOPMENT Meeting Proceedings

**Thursday, November 20, 2003
9:00 AM-11: 30 AM**

1. Opening Remarks

Mr. Dan Varin, Chairman, Rhode Island Water Resources Board (WRB), welcomed participants to today's meeting. He thanked everyone for their hard work throughout the process. He explained that today's objective is to identify recommendations for the Board. He introduced Juan Mariscal, Narragansett Bay Commission, who is now working with the WRB. He also introduced Ms. Beverly O'Keefe, Supervising Planner, and the newest member of the WRB. Mr. Varin next introduced Ms. Kathleen Crawley, Staff Director, WRB, who welcomed committee members. She directed attention to a review of today's agenda. She stated that the hope is to identify the first action items that can be brought to the Board for review and discussion. She acknowledged that today's process may be difficult and recalled the comments made by Mr. Peter Marino, lead of the Joint Advocacy and Funding Committee, during last month's meeting when he encouraged members to identify the 2-3 most important priorities or "must haves" out of the list of 84 priorities. Today's agenda includes a presentation from the lead of the Water Rights/Regulatory Authority Committee led by Dale Thompson, Visiting Associate Professor, Roger Williams University School of Law. A discussion on the overall WAPAC recommendations will follow.

Ms. Crawley referenced the documents that support today's agenda:

1. October WAPAC meeting materials related to the recommendations analysis
2. Report titled, Preliminary Findings of the Subcommittee on Water Rights and Regulatory Authorities
3. WAPAC Thematic Findings with Recommendations
4. Minority Report, RI Farm Bureau
5. Water Allocation Program Advisory Committee: First Steps

2. Water Rights Committee Presentation: Ms. Crawley welcomed Prof. Thompson, providing praise for his work as sub-committee lead who not only facilitated the diverse views of this committee but who also brought students on board to support the work of the committee. She stated that Mr. Thompson brought a high level of professionalism to the work as is reflected in the committee's report. Mr. Thompson prefaced his presentation by thanking Erik Hammarlund, graduate student and research assistant, for his invaluable research assistance and in drafting the executive summary. He stated the Water Rights/Regulatory Authority Committee was charged to come up with recommendations regarding water rights structures. He mentioned that the committee identified deficiencies in existing laws, regulations and policies several months ago. The main text of the report contains recommendations and footnotes that provide additional detail, footnotes that should be read to understand the diversity and complexity of the recommendations. Mr. Thompson proceeded with the main body of the presentation that was supported by a power point presentation.

The Water Rights Subcommittee identified six primary recommendations:

1. WRB should be the arbiter of reasonable use
2. Establish a legislative link between water quality and water quantity
3. Establish a legislative link between surface and ground water
4. Develop policies that will enable predictable responses during drought

5. Continue to collect data to aid current and future water use decisions
6. Develop a new water rights structure using a combination of voluntary, market and regulatory approaches during droughts, registration of certain users, and full-time permitting of certain uses

The committee's primary recommendation is that WRB become the locus of determining whether uses are reasonable. Current legal doctrine puts the determination of what is reasonable use in the courts, which occurs on a case-by-case basis. We recommend centralizing this through the WRB for predictability, but maintaining the right for recourse through the courts if the matter cannot be resolved by administrative review. In trying to deal with drought, the growth of the state, and increased developments, it would be useful to plan for how we manage the state's water resources. In addition, we need a plan of action if we have a large groundwater contamination. It will be helpful to have the procedures and steps already laid out in order to make good decisions. The connection between ground and surface water, and water quality and quantity—it would be helpful to have a link in the decision process in order to consider the effects. We cannot continue to make decisions in a vacuum. We need to have sufficient data to support better decisions. Finally, we need to come up with a new rights structure. As a committee, we were not able to decide on a preferred approach but it is important that we develop a combination that takes into consideration all of these important points.

Our first set of findings had to do with regulatory authority and this will be an appendix in the report that includes diagrams of the current regulatory authority and a matrix of deficiencies with potential solutions in regulatory authority where current conflict occurs. It is important to encourage the integration of water quality permit programs and to identify self-supply users. The existing water rights doctrine in Rhode Island for surface water is the Reasonable Use Riparian Doctrine that says that if a person owns land contiguous to a water body, they have a "usufructuary" right, subject to reasonable use limitations. The Reasonable Use Riparian Doctrine empowers the court to make a decision on whether there is reasonable use of surface water or not, and this can change with each individual case. In times of drought, often there are conflicting uses especially among businesses. Then the courts must decide on what is reasonable use. In ground water, there is very little doctrine and few decisions in Rhode Island. What does exist relies on the American Rule of Reasonable Use, which says users have a right to take water as long as they do not waste it, or harm others' use of water. The main recommendation is to shift from the judiciary to an administrative system in order to provide more predictability and consistency. The sub-committee identified general recommendations that include:

1. The waters of the State of Rhode Island are a natural resource owned by the State in trust for the public and subject to the State's sovereign power to plan, regulate, and control the withdrawal and use of those waters, under law, in order to protect the public health, safety, and welfare.
2. An accurate inventory of withdrawals and supplies is necessary.
3. Water withdrawals continue to be subject to the "reasonable use" standard.
4. Water allocation decisions should recognize the interdependencies of water quality and water quantity, and between groundwater and surface waters.
5. Water allocation should play an important role in land use and development decisions, both in ensuring sufficient supply of water, and in assessing the impact of development on water resources.

Mr. Thompson discussed the water rights structures that included several alternatives. He noted that the sub-committee was divided regarding alternatives that include:

1. Alternative 1: Management of a Drought Situation
 - 7R-3-02 – Declaration of a Water Shortage
 - 7R-3-03 – Declaration of a Water Emergency
2. Alternative 1a: Voluntary Approach

- a. Involves education and encouragement to use water saving devices
 - b. Would endeavor to 1) educate the public about water shortage; 2) collect data from farmers and business; 3) Establish minimum stream flow goals
- 3. Alternative 1b: Market Approach
 - a. Could involve of banking (inter-temporal trades) and temporary transfer of water allocation
 - b. Use price to allocate water
 - c. Prices may adjust according to drought condition
 - d. Requires significant information, reporting and establishment of baseline data
- 4. Alternative 1c: Regulatory Approach
 - a. As drought worsens, additional mandatory restrictions will be put in place
 - b. Priority criteria applied to determine the restriction
 - c. Also requires information reporting
- 5. Alternative 2: Registration System – for users above a certain level of use
- 6. Alternative 3: Full Permit System – would take guidance from Reasonable Use Riparian Doctrine and Model Water Code
- 7. Alternative 4: Combination of the above systems.

Mr. Thompson concluded his presentation by stating that groundwater should be managed consistent with management of surface waters, and that additional information on the use of groundwater and the availability of groundwater in aquifers is necessary if we are to move away from the court system in order to establish predictability.

A question was asked regarding how to change the existing legislation. Mr. Thompson responded by stating that legislation needs to be prepared connecting the WRB to land use and the stewardship of the state's water resources. The relationship between WRB and the RI Dept. of Administration, Division of Statewide Planning will need to be defined.

Ms. Eugenia Marks, Audubon Society of RI, stated there should be enforcement of the community comprehensive plans. She acknowledged that agricultural use should be a high priority but questioned whether a differentiation should be made between food supply and ornamental crops in the agricultural sector. In her opinion, food supply crops should have a high priority but she did not think that the non-food crops should have the same priority. Mr. Stamp, a WRB member and a representative of the farm community responded, "Farmland, regardless of type of crop, should be viewed as open space and that proposals to regulate water use would destabilize business which would lead to economic instability." Asked if any analysis had been done on this question, Mr. Thompson responded in the negative, noting that the Priority Use Subcommittee may have worked on this question.

Mr. Andy Dzykewicz, RI Economic Development Corporation, asked if an analysis was completed on the existing legal structure and how the recommendations would change the structure from the judicial branch to the executive branch. Mr. Thompson responded by stating that a specific review of the statutes was not conducted. Ms. Connie McGreavy, WRB staff, noted that several agency attorneys were recruited for this committee, but they did not prepare a detailed statutory review. The committee, however, chose to depict regulatory authority visually, using diagrams, which were provided to the WAPAC several months ago. Ms. Elizabeth Scott, RI Dept. of Environmental Management (DEM), stated that it is important to acknowledge existing authorities such as freshwater wetlands, RIPDES permit system (wastewater discharges) and RI Coastal Resources Management Council (CRMC) authorities. She added that in the short term, existing regulations should be reviewed to determine if they can be enhanced or improved while over the long term, a registration system could be implemented.

Ms. Kendra Beaver, Save The Bay, stated that the recommendation to move from the judicial system to the executive branch will allow planning on how to manage water resources; second, the lack of a registration system will prevent the gathering of information and data for planning purposes. Mr. Henry Meyer, Kingston Water District, noted that Rhode Island history on water use and regulation shows the lack of procedure; there is no clear-cut procedure in the administrative agencies—some are with DEM and some with CRMC. He added that the last major water regulation review was completed by a judge in 1827. He recommended that a statute for review of WRB decisions in the court system be established. Mr. Thompson concurred, stating there is a need for clarification and predictability that a change from the judicial system to the executive system would provide.

Mr. Donohue, Tuckahoe Turf, asked whether consideration was given to tying water rights to the land. Mr. Thompson responded that consideration was given to historical interpretation of water rights. He noted that there are current administrative authorities (CRMC, WRB, DEM, RI Dept. of Health, etc) that currently review water use, and we must acknowledge the current regulatory structure. Mr. Thompson responded that it might be necessary to have a full registration and permitting program. There may be a way to enhance the current regulatory structure. Ms. Crawley thanked Mr. Thompson for his presentation and requested that stakeholders submit additional comments in writing to the WRB. Mr. Thompson can be contacted directly at dthompson@rwu.edu.

3. Discussion of WAPAC Recommendations: Ms. Crawley began a discussion of the WAPAC recommendations and the group identification of action items that will be taken to the WRB for review and recommendation. Ms. McGreavy discussed the process of establishing the critical path towards a comprehensive statewide water management program. She noted that her presentation would reference the document, WAPAC Thematic Findings with Recommendations which was built from materials first provided at the October meeting: She began her presentation by referring to the 84 recommendations brought up from the various committees. She explained that the focus was shifting away from individual subcommittee recommendations to the essential, overall elements needed to define a water management program. Ms. McGreavy reviewed the handout that provided recommendations on planning, policy, and regulatory “clean up”, matters which she termed, a “just do it” list that did not require legislation or funding. She highlighted two land use recommendations among the top twenty “priorities” that were categorized by theme. She focused the group’s attention on the top twenty, which were also sorted by whether legislation or funding was needed. Summarizing the top twenty, she noted that all but one of the recommendations required funding, and about half required legislation.

Ms. Crawley thanked Ms. McGreavy for her analysis, and directed participants to work towards consensus on the first steps. The presentation included approximately 1-5 immediate action items for each of the eight subcommittees, as well as other required action items. (The Joint Advocacy & Funding Committee did not make recommendations.) Ms. Crawley noted the commitment and valuable feedback of several committee leads including Alicia Good, Anne Veeger, Walter Combs, John O’Brien and Juan Mariscal. Ms. Crawley reviewed first steps for the Water Use Subcommittee. She stated that a necessary first step would be to get the critical information infrastructure in place to accept data necessary for informed program management. She noted, in response to a question, that the threshold of 3MGY (million gallons per year) was taken from the WRB’s Water Supply Systems Management Plan Rules and Procedures for major public water suppliers. Ms. Veeger described the process for establishing the threshold, stating that the number is also hydrologically based for “major users.” A second question asked if golf course water use was included in the numbers; Ms. Crawley responded in the affirmative.

Ms. Crawley proceeded to the first steps for the Stream Flow Subcommittee: maintaining existing gages, evaluation and modification of the proposed RI ABF (Aquatic Base Flow-streams), prioritize new gages with a phase-in schedule, and develop a framework for watershed specific standards. Ms. Alicia Good, DEM, noted that more technical experts were welcome to join the committee. Ms. Crawley briefly

reviewed the priority items for the Out-Of-Basin Transfer (OObT) Committee, and noted that several individuals who developed these recommendations were not able to attend today's meeting. Mr. Meyer noted that a meeting would be held within two weeks to streamline the recommendations. Ms. Karp asked how the recommendations would apply to the Big River Management Area, or to Quonset, and if the decisions would be made by the WAPAC or the WRB. Mr. Meyer responded that the sub-committee was not site-specific, but looked at overall hydrologic considerations. He noted that the group was more concerned that a statewide permit system be developed, and that they took a general approach in their review. Ms. McGreavy added that all committees were asked to focus on the two pilot watersheds—the Wood Pawcatuck and the Blackstone—but that the OObT Committee acknowledged that OObT occurs on a larger scale in other basins. The Water/Wastewater Committee looked at reusing water on state-owned properties, including Quonset. Ms. Marks questioned as to who is charged to analyze the donor-receiver basin transfer and how would HUC (Hydrologic Unit Code) designations fit into this. She asked if a procedure existed or would be developed and put into the report. Mr. Herb Johnston, hydrogeologist, replied that the definition of basin is purposefully not aligned with HUCs, but rather, “geographic water accounting areas” and that this determination should be left up to the reviewing authority in order to assess “adverse impact.”

Mr. Harold Ward, Brown University, questioned the wording and meaning of “formal multi-disciplinary team” [for pre-application review process for development]. Ms. McGreavy explained that the “who” question has not yet been defined, but one model was the Technical Committee of the State Planning Council. Her review of land use/zoning laws showed that communities could form technical review teams, but that these teams are often comprised of volunteers who are not trained in the type of sophisticated analyses that would be needed. An overarching statewide technical review team was appropriate. Ms. McGreavy noted that the OObT Committee assessed the CRMC review process for projects located in special management areas. If a project is proposed with six units or more, then detailed environmental assessment is necessary for project approval. Ms. McGreavy encouraged all stakeholders to think carefully about the “critical path” before the December WAPAC meeting. Mr. Dan Varin, WRB Chair, noted that it would be nice to allocate some items to an agency, but the reality is that it has to be done within the context of the Governor's Fiscal Fitness program. Decisions have been and should be made based on principles, topics, and technical aspects, and not on agency-specific needs, since a particular agency may not exist in the future. Ms. Karp stressed that we need to emphasize conservation. Mr. Stamp stated strongly that voluntary conservation measures and incentives were preferable to a mandatory system.

Discussion continued during the review of each sub-committee's first steps. Ms. Karp recommended that declining flat rates be eliminated. Mr. Guy Lefebvre, Pawtuxet River Watershed Council, noted that a generally accepted threshold nationwide for water rates is 2% of mean annual income. In Rhode Island, income is equal to about \$40,000; thus, an annual water bill could be about \$1,000. He added that affordability rates for water have been established but the index for wastewater is different. He stated that there is room, based on this analysis, to implement a water allocation fee. Mr. Meyer responded by noting that the figure is biased since it is a national average, and not reflective of our region. He noted the relative burden of rates across incomes, and that currently, in Rhode Island, the average water bill is about 1% of annual income. Ms. Crawley continued that the priority recommendation for the Impact Analysis Subcommittee regards the relationship between land use and water availability. Other Recommendations include technical assistance, conservation, MUTAP (Major Users Technical Assistance Program), land use, and demand management. She encouraged stakeholders to identify the critical first steps in moving forward. Ms. Scott added that a critical area is rate setting to accommodate any changes, including technical assistance. Ms. Crawley responded that the first step would be to obtain information in order to make decisions, i.e. accurate report of water use. Mr. Stamp strongly objected to mandatory reporting in any form.

Ms. Sandra Whitehouse, Environmental Policy Advisor for the RI House of Representatives, stated that the priority recommendations are more important than an identification of the first steps. Ms. Karp stated that maybe the first priority is clarification of existing laws and regulations. Examples could include rates and abandonment of supplies. What is required now? What is being done? She added that three types of basic information are needed: what the laws are and who administers them, good information on water use, and what is needed. She also stated that we have policies that either promote conservation or do not. There was agreement and acknowledgement that if the market based approach is used, then an accurate rate structure is needed if this is to be the driving force. Mr. Stamp stated that a market approach is good, but centralized control of water resources should not happen, as a free market is needed to support the economy. He stated there are too many controls and regulations already. Ms. McGreavy stated that a clarification of the laws and regulations by attorneys would occur. It was noted that an understanding of the body of existing law, who administers each law, patterns of water use, and good information on available water is needed.

Ms. Crawley polled the WAPAC for recommendations on the essential first steps. After discussion, there was consensus on the need for data and reporting in order to create the necessary knowledge base. The recommendation to the Board is that the WAPAC endorse the three Water Use Reporting recommendations as “first steps” with the understanding that there is strong objection on mandatory reporting for the self-supplied users from the farming community. There were no objections voiced to voluntary reporting. Ms. Sandra Whitehouse noted that of the top 20 recommendations, one did not require legislation or funding – evaluate and modify the proposed RIABF. There was group consensus on this additional item. Ms. Crawley stated that this item would be forwarded to the Board along with the water data recommendations. Ms. Crawley thanked everyone for their participation and commitment to the process. The meeting adjourned at 11:30 AM.

Respectfully submitted,

Beverly O’Keefe, Supervising Planner
RI Water Resources Board

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